

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECRETARY OF HEALTH, EDUCATION
AND WELFARE,

Appellant

v.

LUCY MEZA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

PETITION OF APPELLANT FOR REHEARING

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The Secretary of Health, Education and Welfare, appellant in the above-styled cause, respectfully petitions for a rehearing of the judgment of this Court entered on August 31, 1966. The basis for this petition is as follows:

1. This action was brought by the appellee, Lucy Meza to review the final decision of the Secretary denying her claim for social security benefits, which claim was based upon the

alleged presumed death of her ex-husband, Domingo Meza. The Secretary's denial of the claim was based on his finding that there was no evidence of death and that the absence of Domingo for more than 7 years was not an unexplained absence. In its opinion and judgment of August 31, 1966, this Court affirmed the determination of the district court that the Secretary's decision was not supported by substantial evidence and that Domingo Meza's death must be presumed.

2. On the same date that this Court's opinion and judgment were rendered, but before notification of that decision and judgment was received by us, we were advised by the Department of Health, Education and Welfare that the Appeals Council of that Department had just been furnished with information to the effect that an application for retirement insurance benefit had been filed in Houston, Texas by a Domingo Meza. It was later disclosed that this application had been filed on July 5, 1966, and that on the following day, applications for wife's and child insurance benefits had been filed by one Amelia Montoya Meza, who represented herself to be the wife of Domingo Meza.

Upon receipt of the advice from the Appeals Council that Meza apparently had filed an application, we requested prompt documentary verification. On the following day, September 1, 1966, when it became apparent that it might be a matter of several days before the documents would be received from the

Department of Health, Education and Welfare, J. F. Bishop, one of the attorneys of record for the Secretary in this Court, telephoned the Clerk of the Court to alert him to the fact that the Secretary probably would be filing supplemental papers in connection with the pending appeal. Mr. Bishop was informed by the Clerk that this Court's decision, affirming the judgment of the district court, had been rendered on the previous day.

3. On the basis of documents in the possession of the Department of Health, Education and Welfare, copies of which are being filed with the Clerk of this Court and served upon counsel for the appellee together with this petition for rehearing, it appears reasonably certain that the Domingo Meza who filed the application for retirement insurance benefits in Houston on July 5, 1966 is the husband of the appellee in this case. For this reason, we respectfully submit that the judgment of this Court should be vacated and the cause remanded to the district court with instructions to remand the matter, in turn, to the Department of Health, Education and Welfare for a reopening of the administrative proceedings on Lucy Meza's claim for benefits based upon Domingo's purported death.

a. In his application for retirement insurance benefits, Domingo Meza used the social security number (466-05-2142) which as the administrative transcript on file in this Court reflects (Tr. 1)) was assigned to appellee's husband. In connection with

that application, Domingo Meza submitted a statement which explains the reason why his social security employment record did not reflect earnings after 1954. Meza stated that he had been "a self-employed caddy for about 9 years" but had "never filed a self-employment tax return as I had no idea I was supposed to."

b. When Meza's July 5 application was processed at Baltimore, Maryland, it was discovered that there was a pending death claim (i.e., Lucy's) on the same social security account. As a result, the Houston office of the Social Security Administration was requested to make further inquiry. On July 25, 1966, an additional statement was obtained from Domingo Meza in Houston. In that statement, Meza first referred to his marriage to Amelia Morales and to his divorce from her in Harris County, Texas on May 14, 1945 (which, as this Court's August 31, 1966 opinion reflects, is corroborated by the record.) Meza then went on to discuss his marriage to "Lucy Estrada" (i.e., the appellee) in November, 1945 and his leaving her in 1948. In this regard, Meza stated that "[w]e had a quarrel and I left. One child was born before I left--Juanita. The other child was born after I left. I have not heard anything else about them."

Finally Meza discussed his purported marriage in 1958 to Emily (Amalia) Montoya (which is evidenced by a marriage certificate furnished to the Social Security Administration).

According to Meza, Emily was aware of his first marriage (to Amelia Morales) but "does not know about Lucy. I did not tell her because there had been no divorce and it was something I preferred to forget. I never got a divorce because it would have been too much trouble to travel to California and get the divorce." 1/

4. While, as above noted, we believe that there can be little question that this documentary matter discloses that appellee's husband is still alive, any doubt that might exist with respect to the authenticity of the documents should, we believe, be resolved in the first instance by the Social Security Administration. For this reason, we think that the appropriate course of action now would be the vacation of this Court's judgment and a remand of the proceedings (through the district court) to the Department of Health, Education and Welfare. 2/ Upon the

1/ As the administrative transcript on file with this Court reflects, however, in 1959 Lucy Meza obtained a divorce from Domingo in California (Tr. 32-33). It would seem from Domingo's July 25, 1966 statement that he was unaware of this fact.

2/ Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), empowers a district court "at any time, on good cause shown, [to] order additional evidence to be taken before the Secretary." We submit that newly discovered evidence of the type here involved clearly constitutes such "good cause." Appellee is, of course, not entitled to benefits based upon Domingo's death if, as now appears, Domingo is still alive. Moreover, if the Secretary were required to pay benefits on the basis of Domingo's reported death, it is doubtful whether, at the same time, he could pay retirement benefits to Domingo on the basis of his continuing life. Yet, notwithstanding his misconduct in his marital relationship with appellee, Domingo is entitled to receive retirement benefits if he is still alive and has met the eligibility requirements.

remand, appellee would, of course, have the opportunity to challenge, if there is any basis for doing so, the truth of the representations made in the statements recently given to the Social Security Administration by Domingo Meza.

CONCLUSION

For the foregoing reasons the appellant respectfully requests that the Court grant this petition for rehearing, and that it vacate its decision and judgment of August 31, 1966 and remand the cause to the district court with instructions to remand further to the Secretary.

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General

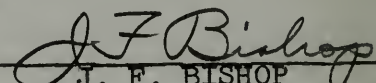
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SEPTEMBER 1966

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded and is presented in good faith and not for the purposes of delay.


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